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AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA
v.
GULF REFINING COMPANY
} No. 40

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO DEFENDANT'S MOTION TO DISMISS OR AFFIRM, AND ASSIGNMENT OF ERRORS AND BRIEF AND ARGUMENT ON BEHALF OF THE UNITED STATES

(Italics in quotations are ours, if not otherwise stated)

STATEMENT OF THE CASE

This is a criminal prosecution for receiving concessions in rates in violation of Section 1 of the Interstate Commerce Act (32 Stat. 847–8) as amended by the act of June 29, 1906 (34 Stat. 584). There were one hundred counts in the indictment. The first forty counts are based on alleged concessions received on consignments of gasoline shipped from Kiefer, Oklahoma, to West Port Arthur, Texas. (Vol. 1, pp. 2–62.) Counts 41 to 85, inclusive

(pp. 62–123), were based on shipments of gasoline from Jenks, Oklahoma, to West Port Arthur, Texas, and the remainder of the counts were based on shipments from Drumright, Oklahoma, to West Port Arthur (pp. 124–145). A plea in abatement was filed, but on motion was stricken out by the court. (Vol. 1, p. 147.) A demurrer to the indictment was also filed which was overruled. (Vol. 1, p. 150.) A trial was had, and all the counts, except No. 44, were submitted to the jury; and the jury found the defendant guilty on each of the ninety-nine counts. The court thereupon imposed the minimum fine of $1,000 under each count, and pronounced judgment against the defendant for $99,000. (Vol. 1, p. 167.) A motion for a new trial was made and overruled. (Vol. 1, p. 943.) The defendant then entered a motion in arrest of judgment, which was also overruled (p. 948). Errors were assigned, and an appeal was prosecuted to the Circuit Court of Appeals for the Eighth Circuit; and that court sustained a number of the assignments of error, and remanded the cause to the District Court "with directions to grant a new trial." (Vol. 2, p. 1692.) The grounds upon which a new trial was awarded appear in the opinion of the Court (Vol. 2, pp. 1690, 1691) and will be stated in the assignment of errors.

REPLY TO DEFENDANT'S MOTION TO DISMISS OR AFFIRM

I

This court has jurisdiction to bring the case here by writ of certiorari

The defendant insists that the case, being a criminal one, can not at the instance of the Government be removed to this court by writ of certiorari.

By Section 6 of the act establishing the Circuit Court of Appeals (Chapter 517, Act of 1891; 26 Stat. 826, 828), appellate jurisdiction, except in specified cases, was vested in the Court of Appeals; and it was provided that the—

> judgments * * * of the circuit courts of appeals shall be final in all cases * * * arising * * * under the criminal laws;

except the Circuit Court of Appeals may certify to the Supreme Court any question or proposition of law concerning which it desires instruction for its decision—

> And excepting also that in any such case as hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In *United States* v. *Dickinson*, 213 U. S. 92, it was held that this provision did not authorize this

court to take jurisdiction over a criminal case in which a judgment of conviction had been reversed by the Circuit Court of Appeals. That case was decided in 1909. And when the Judicial Code was adopted in 1911, Section 240, which embodies the provision of the act of 1891, that relates to the removal of causes from the Circuit Court of Appeals to this court by writs of certiorari, was made to read as follows:

> In any case, *civil or criminal*, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, *upon the petition of any party thereto*, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court. (36 Stat., Chap. 231, p. 1157.)

Omitting the italicized words, this section is exactly the same in substance as the provision originally enacted. The intention to confer jurisdiction upon this court to issue a writ of certiorari to the Circuit Court of Appeals in a criminal case on petition of the Government could not possibly be more clearly expressed. By no possible refinement of construction can the Government be eliminated from the phrase "upon the petition of *any* party thereto." But if any doubt could otherwise exist, it is dispelled by what occurred in the Senate when the words above

italicized were introduced as an amendment to the report of the Committee that had the bill in charge. The following appears in the proceedings of the Senate (46 Cong. Rec. 2134):

> The VICE PRESIDENT. * * * The Senator from Utah (Mr. Sutherland) offers the following amendment:
>
> The SECRETARY. On page 173, section 227, in line 6, after the word "case," insert "civil or criminal," and in line 9, after the word "otherwise," insert "upon the petition of any party thereto."
>
> Mr. HEYBURN. I call the attention of the Senator from Utah to the effect this amendment would have. Would that include the United States as a party?
>
> Mr. SUTHERLAND. *That is the object of it.*
>
> Mr. HEYBURN. *It permits the United States to ask through certiorari proceedings for a review of a criminal case?*
>
> Mr. SUTHERLAND. *Yes.*
>
> Mr. HEYBURN. It is pretty wide departure, it seems to me. I do not want to enter into much controversy about it, but it seems to me that it is going a good ways from the established rule to allow the United States to review a criminal case by writ of certiorari.
>
> Mr. SUTHERLAND. *The object of it is this: Very often in the circuit court of appeals a criminal case has gone off on a purely technical proposition, and there is no way by which the question can be got to the Supreme Court of the United States. I think in some cases it is a great necessity that the Supreme Court of the*

United States should have the power to review such a case.

Mr. HEYBURN. We hesitated a long time before we allowed the right of appeal to the United States in criminal cases. It is only a few months since we enacted that legislation. *Now, if we allow the United States, in a case where there is no right of appeal, to bring up upon certiorari a criminal case that has been decided adversely to the United States, it is going a long way.* I will not do more than interpose these suggestions. I had not anticipated any such amendment being offered. It so radically widens the jurisdiction in the matter of appeals in criminal cases that it seems to me that it ought to go to a standing committee—the Judiciary Committee—of the Senate. *But I am willing to let it pass in. It will be considered in conference.*

The VICE PRESIDENT. The question is on agreeing to the amendment proposed by the Senator from Utah.

The amendment was agreed to.

True, it has often been said rather than practised that debates of a legislative body can not be looked to in construing a statute, but it is well settled that the report of the committee having the bill in charge can be considered by the court. Certainly with greater reason can consideration be given to the explanation as to the purpose and meaning of an amendment given by the member who introduced it, and as a result of which explanation it is then and there adopted.

The bill went to conference; and the report of the conference committee to the House of Representatives was accompanied by a statement in which reference was made to Section 240 as follows (46 Cong. Rec. 4001):

> The other amendments made by the Senate, embracing substantive changes, were as follows:
>
> * * * * *
>
> Section 240 (227). The insertion of the words, "civil or criminal," and the words "upon the petition of any party thereto." The effect of this amendment is to make more clear the right of the Supreme Court of the United States by writ of certiorari to bring before it for review any case in which the judgment or decree of the Circuit Court of Appeals is made final by the provisions of the Act, and to define more accurately the method by which such writ might be obtained.

It is suggested that this language indicates, not a purpose to extend the power of the court, but to eliminate uncertainty as to the power already possessed. In fact the broad language used in the original act creating the Circuit Court of Appeals does include cases of this character, but following by analogy *United States* v. *Sanges*, 144 U. S. 310, the court was constrained to hold that Congress did not intend to vest the power in this court to issue a writ of certiorari in a criminal case on petition of the Government. In other words, in the *Dickinson* case, the court held that, although the language was broad

enough to include such a case, it would not be construed to do so, because it had been a principle recognized not only by this court, but by the courts of a large majority of the States and of England, not to permit a review of a criminal case by an appellate court at the instance of the Government *unless authority was given by express language.* Therefore the language of the conference committee was apt, because the intention was to make it clear, so clear as to remove any doubt upon the subject, that such authority was vested in this court. If the words added on motion of Senator Sutherland do not have that effect, then what do they mean? And what sense is there in the language used by the Conference Committee? Instead of making more clear the extent of the power of the Court and defining more accurately how the writ may be obtained, they would be senseless, and would but add uncertainty as to the powers possessed by the court in this respect.

II

The fact that the mandate, following the judgment of the Circuit Court of Appeals, directs a new trial is immaterial

Although the court in its opinion held that the trial court committed error in not directing a verdict for the defendant, yet in its judgment it remanded the case to the District Court "with directions to direct a new trial."

But so far as the jurisdiction of this court is concerned it can make no difference whether the judg-

ment in the Circuit Court of Appeals was final or not. There is a broad distinction between final decisions of district courts, which the circuit court of appeals is given authority to review by section 128 of the Judicial Code, and "a final judgment or decree in any suit in the highest court of a State," which, if involving certain questions, can be reviewed by this court, and judgments and decrees of the circuit courts of appeal, which are declared final by said section 128. What is meant by the judgments and decrees of that court being final in the classes of cases specified is that there is no appeal therefrom as a matter of right, and they can only be reviewed by writs of certiorari. As said by the Chief Justice in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 57:

> By this section judgments or decrees in the enumerated classes of cases are made final in terms by way of the exclusion of any review by writ of error or appeal, while as to cases not expressly made final by this section, appeal or writ of error may be had of right, where the money value of the matter in controversy exceeds one thousand dollars besides costs.

The effect of the provision is thus clearly stated by the court in *American Construction Company* v. *Jacksonville Railway Company*, 148 U. S. 372, 385:

> Then follows the provision in question, conferring upon this court authority "in any such case as is hereinbefore made final in the Circuit Court of Appeals," to require, by *certiorari* or otherwise, the case to be certified to this

> court for its review and determination. There is nothing in the act to preclude this court from ordering the whole case to be sent up, when no distinct questions of law have been certified to it by the Circuit Court of Appeals, at as early a stage as when such questions have been so certified. The only restriction upon the exercise of the power of this court, independently of any action of the Circuit Court of Appeals, in this regard, is to cases "made final in the Circuit Court of Appeals," *that is to say, to cases in which the statute makes the judgment of that court final, not to cases in which that court has rendered a final judgment.* Doubtless, this power would seldom be exercised before final judgment in the Circuit Court of Appeals, and very rarely indeed before the case was ready for decision upon the merits in that court. But the question at what stage of the proceedings, and under what circumstances, the case should be required, by *certiorari* or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require.

Since the preparation of this brief this court granted, on October 20, 1924, a writ of certiorari on petition of the United States in the case of *United States, Petitioner*, v. *Trenton Potteries Co. et al.*, No. 591, on the docket of the Supreme Court for the present term. That case was in the same condition as this, except the Court of Appeals had not held that there was no evidence to sustain the verdict of the jury.

III

The questions presented in this case are of such gravity as to require their review by this court

The questions presented in this case are vitally important for the following reasons:

1. The Circuit Court of Appeals has undertaken to pass upon the merits of the case, and by casting aside all evidence relating to common understanding and the conduct and practices of defendant itself, and giving attention solely to technical but indefinite and contradictory definitions of gasoline given by experts, when their own testimony show that their definitions are wholly inaccurate, has determined that the record presents no controverted question of fact. In a case of great magnitude, and upon the determination of which the rights of many other parties depend, a departure from fundamental and universally recognized principles applicable in determining whether a case involves a question of fact for the decision of a jury itself requires a review of the case by this court.

2. The Circuit Court of Appeals has in effect decided that, in determining under what rate an article shall be shipped, the name by which the article is generally known by its producers and by the trade, and under which it has always been shipped, except by the accused under the circumstances out of which the controversy has arisen, and its similarity to and in important particulars identity with an article which undisputably must be shipped under a

specified rate, *has no evidential weight whatever*, but that the shipping name of the article is to be determined *entirely* by its characteristics as described and its technical definition given by experts, and has thus overruled the well-recognized principle that the shipping name of a commodity is that under which it is generally known in commerce and among those by whom it is produced, used, and consumed.

3. The Circuit Court of Appeals in its decision disregarded entirely the regulations of the Interstate Commerce Commission, made within the scope of its authority, wherein the Commission directed that the commodity here in question be designated as "gasoline," and directed that it be shipped under that name.

4. In *Southern Carbon Company* v. *Arkansas and Louisiana Midland Railway Company*, 62 I. C. C. 733, which was decided after the trial of this case in the District Court but before the decision was handed down by the Circuit Court of Appeals, the Interstate Commerce Commission held that a commodity identical with casinghead gasoline was "gasoline," and that rates on "gasoline" were applicable thereto, and therefore a conflict upon this question exists between the Circuit Court of Appeals and the Interstate Commerce Commission, the body upon which Congress has expressly conferred authority to determine questions of this character.

ASSIGNMENT OF ERRORS

The United States insists that the Circuit Court of Appeals erred in the following respects, to wit:

I

In holding that "When all competent and relevant proof in the case is given a fair and impartial consideration the conclusion that the verdict is without support is inevitable"; and that the trial court "erred in refusing defendant's request for an instructed verdict." (Vol. 2, pp. 1691, 1692.)

This question was raised in the Court of Appeals in the sixth assignment of error. (Vol. 2, pp. 1543, 1544.)

II

In holding that plaintiff improperly throughout the trial in the District Court insisted that the conduct of the defendant was fraudulent, one ground for the insistence being that its traffic agent asked for the rate on unrefined naphtha; when the claim of fraud in that respect was refuted by the fact that the Interstate Commerce Commission had established a rate to Baton Rouge on a product designated "unrefined naphtha" shown to be substantially the same as the condensate of the Gypsy Company plant. (Vol. 2, p. 1690.)

Apparently this holding of the court is based on the evidence set out in the assignments of error which appear in Vol. 2 on pages 1544–1548, 1550–1553, 1559–1601, 1632, 1638, 1640, 1641, and 1663.

III

In holding that it was error for the Trial Court to admit over objection testimony showing that the same commodity was being shipped by the Gypsy Company to Pittsburgh after December 2, 1916, as "gasoline," while it was being shipped to Port Arthur as "unrefined naphtha." (Vol. 2, p. 1690.)

The evidence upon this subject, which it was held should not have been admitted, is set forth in the assignments of error in the Court of Appeals found in Vol. 2, pp. 1569–1588, 1640–1645.

IV

In holding that the Trial Court erred in admitting over objection testimony that "casinghead gasoline and blended product at other casinghead compression plants in Oklahoma were called gasoline and shipped as gasoline, without a showing that they were substantially similar to those of the Gypsy Company, and in the face of proof that they were not of a uniform blend with those of the Gypsy Company but contained, in some instances, as much as 75% naphtha." (Vol. 2, p. 1690.)

The evidence, which under this holding should not have been admitted, is set forth in the assignments of error in the Court of Appeals, appearing in Vol. 2, pp. 1569–1588, 1640–1645.

V

In holding that the remarks of government counsel in argument to the jury to the effect that the Mellon

Institute at Pittsburgh was founded by the Mellon family and Mr. Mellon is president of the Gulf Oil Corporation, and also that the company by this advantage put in its own pocket hundreds of thousands of dollars which it was not entitled to, and of which the people of the United States have to bear the burdens, afforded grounds for reversal. (Vol. 2, pp. 1690, 1691.)

The assignment of error in the Court of Appeals relating to this subject is 117, p. 1663, and the remarks referred to by the Court of Appeals appear in the record, Vol. 1, pp. 905–907.

BRIEF AND ARGUMENT

The assignments of error will be considered in the order mentioned.

I

The Circuit Court of Appeals erred in holding that "When all competent and relevant proof in the case is given a fair and impartial consideration the conclusion that the verdict is without support is inevitable," and that the trial court "erred in refusing defendant's request for an instructed verdict"

The finding by the Court of Appeals, that the verdict of the jury is without support of evidence, necessitates a somewhat extended citation of the evidence and discussion of the facts; but such discussion will enable the Court to readily see the relevancy of the evidence which that court held should have been rejected.

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The shipments in question were made to defendant by the Gypsy Oil Company; and it was admitted that the Gulf Oil Company is a corporation of which the Gypsy and Gulf Refining Companies are subsidiaries, the Gulf Oil Company owning all the stock of the other two companies except a few shares personally held by the directors for qualifying purposes. (Vol. 1, p. 210.) It is also shown without dispute that Mr. Donovan was General Superintendent of the Gasoline Department of both the Gulf and Gypsy Companies, and that he reported to Mr. Tabor, who was Vice President of the Gulf Company, and that Mr. Ellis was Traffic Manager for both companies. (Vol. 1, pp. 246–248.) And it was admitted that Mr. Ellis, as Traffic Manager of the Gulf Company, instructed Mr. Donovan how to ship the product in question. (Vol. 1, p. 484.)

After December 2, 1916, between Kiefer, Jenks, and Drumright, oil-producing points in Oklahoma, and Port Arthur and West Port Arthur (the termination of a branch line about two miles in length), Texas, there were two published commodity rates, one on "gasoline in tank cars" at 33¢ per 100 pounds, and the other on "unrefined naphtha in tank cars" at 19½¢ per 100 pounds. (Topping, Vol. 1, pp. 285–288, and exhibits Vol. 2, pp. 985, 1043. The same rates also appear in numerous other exhibits.) There was also a rate of 39¢ on "Oils: Petroleum oil and its products * * * listed under head of 'Petroleum and Petroleum Products.'" (Gov. Ex. 36, Vol. 2, pp. 981, 984, 986, and numerous other tariffs.)

The product in question was shipped as "unrefined naphtha" at the 19½¢ rate (Vol. 1, p. 190); and the question of fact for the jury was whether this was a correct designation or whether it should have been shipped as "gasoline" at the 33¢ rate. If the higher rate applied, the defendant received a concession of 13½¢ per 100 pounds as alleged in the indictment. Plaintiff here in the beginning emphasizes its contention that the question was not whether the product answered in every respect to a *technical* definition of gasoline, as appears to have been the view of the Court of Appeals, but *what was its proper shipping designation?* When so considered, we respectfully submit, the Court of Appeals could have held with greater reason that there was no material evidence contrary to the verdict, and therefore that no prejudicial error could have been committed in the admission of testimony, in argument of counsel, or in the charge of the court.

The exact nature of the product in question will appear from a consideration of the treatment of crude petroleum and of the products resulting therefrom.

The "naphtha fraction" and products derived therefrom

The Government introduced Mr. Pritchard, who was Superintendent of the Gulf Refining Company; and on cross-examination he briefly described the manufacture of petroleum products in so far as it is important in this litigation. He says that the "naphtha fraction" is the portion of the crude oil

which contains gasoline, naphtha, and benzine, and is the lighter hydrocarbons of the crude oil. In the first distillation the "naphtha fraction" is separated from the balance of the crude oil, and is pumped into the agitator and given a sulphuric-acid treatment to purify it before *its* distillation. It is then put in the steaming still, and is there subdivided into naphtha, benzine, and gasoline. Gasoline is the lighter fraction, benzine the intermediate, and naphtha the heavy. He also says that while in the process of refining they are all called "naphtha," but that after refined some people call one finished product "gasoline," another "benzine," and another "naphtha," and that others call the entire group "naphtha." With this process the distillation is complete, but the product that is to become gasoline is given a chemical treatment varying according to what is required, and is then pumped out into the tanks. (Vol. 1, pp. 586–589.) Defendant's expert Tabor says the "naphtha fraction" includes the parts "which come off from the crude oil from the beginning of distillation down to what goes into burning oil." (Vol. 1, pp. 676, 677.) Pritchard says that painter's naphtha is the heavy naphtha which is used for the purpose of treating, and has a gravity of about 54. (Vol. 1, pp. 585–6.) Riedeman, who was employed from September, 1916, to September, 1918, in the gasoline end of the Gypsy Company, says that he made gravity and color tests of the naphtha that was shipped to Kiefer for blending as hereafter explained, and that the gravity was around

54 (Vol. 1, p. 185); while Otey, who was employed by the defendant as inspector at Port Arthur, says that its gravity was 55.6 plus and its color 25 (Vol. 1, p. 470), which means that it was white.

Production of Casinghead Gasoline

Casinghead gasoline is the name of a product obtained from oil wells. Gases emanate in the wells, and these gases are pumped through tubes to plants for treatment. (Riedeman, Vol. 1, pp. 185–6.) If oil gets in the line through which the gas is conducted from the well to the plant the product is discolored and rendered impure. And at Kiefer they had erected a tank, which they called a "scrubber," about four feet in diameter and ten feet high; and the gas was injected into this tank about the center; and the moisture, oil, and other foreign matter was thereby separated from it. (Millard, Vol. 1, pp. 551–2.) The same process was used at Drumright, though Routh did not know the tank was called a "scrubber." (Vol. 1, p. 236.) The gas was reduced into a liquid by compression. (Sweet, Vol. 1, p. 202.) Routh, Superintendent at Drumright, says the vapor tension of the liquid that came from the compressor was from 20 to 30 pounds, and the specific gravity was from 88 to 90, and its color was generally white to the eye. (Vol. 1, pp. 242–3.) Millard, who was Superintendent at Kiefer from February, 1914, to November, 1918, says that the product was generally white, and if colored they shipped it by itself. (Vol. 1, pp. 552–3.)

Blending of naphtha and casinghead gasoline at compression plants, and the character of the resultant product

Naphtha or painter's naphtha, which is above described and is one of the products resulting from the steam distillation of the naphtha fraction, was shipped in tank cars from the refining plant at West Port Arthur to the casinghead plants, and there blended with the casinghead gasoline. This naphtha was shipped north in clean cars. (Riedeman, Vol. 1, p. 186.) Riedeman says that the two products were blended "to lower the gravity of the casinghead gasoline." (Vol. 1, p. 187.) The vapor tension of the casinghead gasoline was generally about 10 pounds to the square inch; and this blend with the naphtha was made to reduce the pressure below 10 pounds. According to Routh the blend at Drumright was in the proportion of 35% naphtha and 65% gasoline. After the blend was made, it was weathered so as to still further reduce the vapor tension. (Vol. 1, pp. 236–7.) Sweet thinks that at Kiefer the blend was about one-third naphtha and two-thirds gasoline. (Vol. 1, p. 203.) The color of the blended material as a general proposition was white, and its gravity varied from 70 to 75. (Vol. 1, p. 243.) Pritchard says that the naphtha is used as a holder or container of the casinghead gasoline, and absorbs and keeps it in a liquid solution, and makes it safer to handle. (Vol. 1, p. 591.) Pritchard also says that the specific gravity of this product received from Jenks was about 77 or 78, and some as high as 80, that the average color was 24 to 25 and the vapor tension was about 8 (Vol.

1, pp. 594–5), and that the gravity of that received from Drumright was about 77. (Vol. 1, p. 596.) After the naphtha and gasoline were blended it was shipped to West Port Arthur in the same cars in which the naphtha had been transported from that point; and if the cars had become in any respect dirty, they were cleaned. (Riedeman, Vol. 1, pp. 186–7.) The Jenks product appears to have been unblended, and prepared for shipment only by weathering. Pritchard says it was unblended. (Vol. 1, p. 594.) Millard says it was weathered at Jenks, but the product obtained was similar to that shipped from Kiefer. (Vol. 1, p. 554.)

It was this blend of casinghead gasoline with the painter's naphtha shipped from West Port Arthur that defendant shipped from Kiefer and Drumright to West Port Arthur, and the unblended casinghead gasoline condensed by weathering from Jenks to West Port Arthur, under the name of and at the rate for "unrefined naphtha."

Both before and during the time these shipments were being made the Gypsy Company shipped the same product to other points than West Port Arthur as "gasoline"

Riedeman testifies that prior to December 2, 1916, by instructions from the company, he had always billed this product as "gasoline." (Vol. 1, pp. 190–1.) Millard testifies that prior to December 2, 1916, the product was always billed as "gasoline," and that there was then no change in the commodity, but only in the name. (Vol. 1, p. 550.) It was admitted that prior to the date when the

"unrefined naphtha" rate went into effect, this commodity was shipped as "gasoline" to all points where that rate did not apply. (Vol. 1, p. 249.)

On January 15, 1914, Traffic Manager Ellis wrote a carrier:

> We want to move 10 cars of *gasoline* from Kiefer to Port Arthur, to be handled in our own boats to our eastern distributing stations. (Gov. Ex. 85, Vol. 2, p. 1363.)

On June 2, 1914, Ellis wrote Donovan, Superintendent of the Gypsy Company:

> Upon receipt of this letter, will you kindly change routing on the *gasoline* from Kiefer to Port Arthur, so that it will route: Frisco, H. & T. C., T. & N. O., until further instructions. (Gov. Ex. 68, Vol. 2, p. 1290.)

The product was designated *gasoline* in other correspondence, which will be quoted hereafter.

And it was also admitted that from the time the plant was constructed in 1913 up until about the end of 1914 or 1915 the practice was to ship naphtha from Port Arthur to Kiefer and there blend it with casinghead gasoline, and ship the blended product to northern points, describing it as "gasoline" (Vol. 1, p. 479); that the shipments north were discontinued, except to defendant's plant at Pittsburgh, which shipments continued up to the present time under the name of "gasoline"; that the remainder of the material was shipped to the Fort Worth refinery described as "gasoline" up to 1915, and thereafter to Port Arthur refinery billed and de-

scribed as "gasoline" up to December 2, 1916, and thereafter it was shipped from Kiefer to Port Arthur under the designation "unrefined naphtha," and to Pittsburgh as "gasoline." (Vol. 1, pp. 479–80.) And a specific admission was made that *from the same tank* one carload was shipped to West Port Arthur as "unrefined naphtha" and another car to Shady Side, Pittsburgh, as "gasoline." (Vol. 1, pp. 487–8.) See also Sweet, Vol. 1, p. 215; Millard, Vol. 1, p. 549.

Same product was being shipped at the same time by the Gypsy Company TO CUSTOMERS OF THE GULF REFINING COMPANY DIRECTLY as "gasoline"

Government Exhibit 95 (Vol. 2, pp. 1375–76) is "Partial statement of shipments of blended gasoline made from Kiefer, Okla., by Gypsy Oil Company for account Gulf Refining Company consigned directly to customers of Gulf Refining Company;" and with reference to these shipments, Mr. Millard testifies that they were billed as "gasoline"; that the only difference between the product thus shipped and that shipped to Port Arthur was the gravity, but he does not remember the exact amount of naphtha in the blend; that if he had a 70 gravity casinghead gasoline, and wanted to produce a 60 gravity for the purpose of marketing it direct, he would accomplish the result by blending with naphtha, and that if he wanted to reduce it to a 58 gravity he would accomplish it by using more naphtha, and that there was nothing else done to the gasoline that was sold direct than blending it with naphtha. Different customers called for

different gravities in their orders and the product was made to meet the orders. (Vol. 1, p. 555.)

All other producers than the Gypsy Company both before and after December 2, 1916, shipped this same product as gasoline

It was admitted by counsel for the defendant that the Texas Company had shipped to itself at Port Arthur over certain railroads, upon the dates, in the cars and the quantities alleged in the counts relating to that company, casing-head gasoline blended about one-third naphtha, and described in the shipping orders as "gasoline," and paid charges for the transportation from Kiefer and Jenks rates, respectively, of 33 and 39 cents per 100 pounds; that the commodity shipped to the Texas Company from Kiefer was produced by Crosby & Gillespie, and that shipped from Jenks by the Totem Gasoline Company. This admission was made subject to objection for irrelevancy. (Vol. 1, p. 382.) It was proven by Anderson, employed by the Kadeshan, Totem & Shade Gasoline Company, which company conducted the Totem operation at Jenks, the Kadeshan & Stone at Stone Bluff, and Kadeshan No. 2 at Broken Arrow, that they produced the same article (Vol. 1, p. 329), and that their shipments were made as gasoline (Vol. 1, pp. 333–4). Mr. McCarroll, who was with Crosby & Gillespie at Kiefer, shows that the product shipped to the Texas Company as gasoline was the same as the product here in question. (Vol. 1, pp. 340–3.) Mr. Haigh, Superintendent of the Casinghead Gasoline Plant located at Jenks, belonging to the Ajax Gasoline Company, testified that there were about ten gasoline

plants at Jenks, and that they all operated on the compression system and made about the same product, and that his company billed the product as liquefied petroleum gas when it was over ten pounds pressure and when under such pressure as "gasoline." (Vol. 1, pp. 396–8, 401.) Mr. League, who was inspector for the Bureau of Explosives, maintained by the railroad companies, and who had tested about 50% of the plants in Oklahoma, testified that prior to December 2, 1916, Mr. Donovan spoke of this product as casinghead gasoline, and that it was the same commodity that he investigated after December 2, 1916 (Vol. 1, pp. 410–413), and that the other plants he mentioned shipped the same product as "gasoline" (Vol. 1, pp. 421, 425–7). He further testified that different blends of casinghead gasoline with naphtha were shipped as gasoline, and that it was shipped under the same name when blended with kerosene or crude oil (Vol. 1, pp. 448–9); and that the range of vapor tension of such shipments was from six to ten pounds (Vol. 1, p. 450). Mr. Scott, who was also an inspector of the Explosive Bureau, gave testimony of like character. (Vol. 1, pp. 456–7.) And Mr. Barnhart, who had charge of Franchot's plant, testified that they shipped the product under the name of gasoline. (Vol. 1, p. 463.) Mr. Sweet testified that the Gypsy Company inclosed in drums the same material, except it contained a higher percentage of the naphtha that came from Port Arthur, and shipped it from Kiefer to various places under the name gasoline. (Vol. 1, pp. 215–17.)

Correspondence between Gypsy Company and Railroad Company relative to putting in side track at Drumright

Correspondence between the Gypsy Oil Company and the Railroad Company relating to putting in a spur track at Drumright shows that this product was regarded as gasoline. On November 10, 1916, McKirahan wrote Koontz, both agents of the Railroad Company, in regard to the proposed spur for the Gypsy Company:

> I have succeeded in getting a very conservative estimate from the Gypsy Oil Company, *Gasoline* Department, on the business which this new *gasoline* plant at Drumright will bring us. They estimate that there will be shipped 40 carloads of *gasoline* per month which will go to their refinery at Port Arthur, Texas. Inbound they estimate 13 or 14 carloads of naphtha per month which will come from Port Arthur. (Ex. 76, Vol. II, p. 1294.)

And on February 9, 1917, the Gypsy Company wrote McKirahan:

> In further reference to the *gasoline* loading rack track we intended to have constructed on your line at Drumright, Oklahoma, I now understand that your company will not permit placing of gasoline loading racks within 400 feet of your main line. * * * It seems to me that rules and regulations governing shipments and handling of *gasoline* are laid down by the railroads and others without giving the matter involved due consideration. (Ex. 75, Vol. 11, p. 1293.)

A number of witnesses, who were familiar with the oil industry, testified that the product in question is known as gasoline and is gasoline

Anderson of the Kadeshan, Totem & Shade Company when asked to describe the product says:

It was blended gasoline (Vol. 1, p. 332).

And Haigh, of the Ajax Company, when asked the name of the commodity he produced (which was of the same character) answered, "Gasoline." And when asked by the court what the commodity was called said:

Gasoline after it (is) condensed.

The COURT. What do you mean by condensed?

A. Run through a set of cooling coils and condensed into a liquid form (which he explains was a part of the condensing process).

Q. Then you say after you get it through the compression you call it *gasoline*?

A. *Yes, sir.*

Q. *Suppose you were to combine one-third naphtha and two-thirds of the commodity after it was compressed, what would you call it then?*

A. *Gasoline.*

Q. Just the same name as you would before?

A. Yes, sir.

Q. Why do you call it gasoline when it is through the compression process? How do you get the name gasoline?

A. *Simply as a trade name.* (Vol. 1, p. 396.)

League had testified in chief that the commodity was gasoline; and on cross-examination he was asked

if in so calling it he did not make a mental reservation, and he answered, "No, sir." (Vol. 1, p. 433.) Scott testified that they called this product "gasoline." (Vol. 1, p. 461.) Barnhart, of the Franchot Plant, says they called it "gasoline," and that they shipped it under that name. (Vol. 1, pp. 462–3.)

Use made of product in question after delivered to refinery at West Port Arthur

What was done with the product after it reached West Port Arthur is explained by Mr. Timmons, who was Pump House foreman, and Mr. Pritchard, defendant's superintendent. Mr. Timmons says that when the cars arrived samples would be taken from them and tests made for gravity and color (Vol. 1, p. 255); that if they received a car that was off color it would be pumped into tank No. 829, which was the *crude naphtha* tank, and the contents of that tank were run through a steam still; but the liquid put into tanks 805, 838, and 857 was not rerun, but was thereafter merely blended; that the number of cars they received from Kiefer, Jenks, and Drumright which were pumped into tank 829 was very small, maybe two per cent (Vol. 1, pp. 255–6); and that not to his knowledge was anything done with the contents of tanks 805, 838, and 857 other than to blend them (Vol. 1, p. 257). *It was conceded by counsel that no shipments described in the indictment went into tank No. 829.* (Vol. 1, p. 259.) On cross-examination Timmons said that the custom shows that if the gravity test was 57 or above, it was called

gasoline (Vol. 1, pp. 294–5); and that there were different specifications for gasoline—northern gasoline, southern gasoline, motor specifications and specifications for the Motor Transport Corps of the United States; aeroplane gasoline, fighting gasoline, used for bombing planes; South Carolina motor gasoline, specifications adopted by the State of South Carolina; and the company had its own standard called "Good Gulf Gasoline," and he thinks there were specifications for gasoline to be sold in Texas. They were all to some extent different. (Vol. 1, pp. 309–10.)

Mr. Pritchard testified that, when an order for gasoline was received with certain specifications, a mixture would be made to meet them, and this was done by pumping from the tanks which contained products of different specific gravities, and other qualities, the mixture being tested from time to time until it complied with the requirements of the specifications. (Vol. 1, pp. 586–7, 589.)

To describe it a little more specifically than the witness:

Say there were two tanks, one of which was No. 805, containing the product shipped from Kiefer, which was of high specific gravity, and another tank containing painter's naphtha, of a very low specific gravity. If an order was received for gasoline specifying an intermediate gravity, it would be filled by pumping from each of the tanks until the specific gravity and other requirements were met, and *this combined product was shipped as gasoline and defendant says it was gasoline; but it contends that a product is*

not gasoline, and should not be so shipped, unless it meets the specifications of the particular order.

Citation to the record is probably necessary to substantiate the assertion that such a contention is made. On pages 317–18, Volume 1, counsel for the defendant says:

> Our contention is this, that this product is not gasoline until it is a finished product and that——
>
> The COURT. When is it a finished product?
>
> Mr. SWACKER. After this blending or correcting, *until it gets down to meet the specifications.*
>
> The COURT. You are bringing in other purposes then, although it might be such a product as could be used in some commercial market as gasoline, that until it is blended in this refinery to meet the specifications of the kind of gasoline they put on the market, it would not be gasoline—is that what you mean?
>
> Mr. SWACKER. Yes, sir; we say it is not gasoline, and in (which is) the proper name of the finished product.

On page 590, Vol. 1, Mr. Pritchard says that they don't consider at the Port Arthur refinery any product a refined product until it is a finished one, *and that it might be gasoline for one purchaser and not gasoline for another purchaser.* And on cross examination he says that what he terms gasoline *is the product finished in accordance with the specification of the purchaser, and he doesn't call anything gasoline until it meets the specifications of the man that buys it*

for the market; but he says there are different kinds of gasoline, and he might call one South Carolina gasoline and another motor gasoline. (Vol. 1, p. 602.)

In other words, if a wholesale merchant were to order sorghum molasses of a certain consistency, and molasses of a different consistency were shipped, it would not be sorghum molasses.

Alteration of defendant's records

Some of the documents delivered to Government's agents for inspection were altered by eliminating therefrom the description "gasoline." The Government's Exhibit No. 77 was part of a record that was subsequently kept on the daily test sheet and shows the number of cars that were received from the different points upon specified dates. It appears that on the dates of December 29, 1916, January 1, January 3, January 8, and January 31, 1917, after each word "Kiefer" appeared the word "gasoline" (Vol. 2, pp. 1297–1298–1300), but this word had been erased (Otey, Vol. 1, pp. 501–3); and it was admitted by counsel that these erasures were made before the document was delivered to the Government's agent (p. 507). That part of Government's Exhibit 80, which appears on pages 1330-1336, was a sheet containing a list of cars and showing outages, etc., for the month of April, 1917. This sheet appears to have been made in duplicate, and the heading had been cut off the one first handed to the Government's agent. In response to a *subpœna duces*

tecum the other copy was turned over to the Government during the trial; and that copy is Exhibits 81 and 82. (Vol. 2, pp. 1354–1358.) Exhibit 81 is a letter addressed to defendant's auditor at Pittsburgh and begins, "Our April yield statement will show, as a receipt, 146 cars of *gasoline* from Kiefer," etc.; and Exhibit 82, which is the list attached to Exhibit 81, is headed "Receipts of Kiefer *Gasoline*, April, 1917." (See Stewart, pp. 529–30–31.) The Court of Appeals appears to hold that the effort upon the defendant's agents to conceal their admissions of record that the product in question was gasoline, and was shipped as such, is inadmissible.

When this rate was published the defendant did not disclose to the carriers its purpose to ship this product thereunder

This is fully disclosed by the correspondence preceding its publication, and the testimony of those who represented the carriers. The following correspondence appears in the record:

On January 15, 1914, Mr. Ellis, agent for the defendant, wrote Mr. Powers, agent for the St. L. & S. F. R. R. Co., to the effect that the company wanted to move ten cars of *gasoline* from Kiefer to Port Arthur, to be handled in its boats to its eastern distributing station; that he found nothing but a 37¢ rate published from Kiefer to Port Arthur, and asked that it be arranged to publish a 33¢ rate, the same as the northbound rate from Port Arthur, to Tulsa. He stated that if the movement proved satisfactory he was sure there would be more of it, and that he

believed he could induce the Kansas City Southern to participate in the 33¢ rate. (Ex. 85, Vol. II, p. 1363.) On January 18, 1914, Ellis wired Mitchell of the Kansas City Southern:

> Requested Powers docket rate 33¢ Kiefer to Port Arthur on *gasoline* for coastwise shipments. He has wired you and Christian for concurrence. Hope you will concur. Answer. (Ex. 90, Vol. II, p. 1366.)

On the following day, January 19, Ellis wired Mitchell:

> Exchange telegrams relative 33¢ rate Kiefer to Port Arthur in addition to this southbound rate we are figuring on moving about fifty cars per month or more of *naphtha* Port Arthur to Kiefer have talked with Powers St. Louis long distance and he will make additional request on Leland to-day as separate proposition that same be docketed for San Antonio meeting this will permit of majority cars moving under load both ways want you to favor this and use your influence with other lines am trying to get you long distance. (Ex. 91, Vol. II, p. 1366.)

On the same day Ellis again wrote Powers stating that they were figuring on from 50 to 75 cars of naphtha per month from Port Arthur to Kiefer, and that he found the existing rate of 43¢ per 100 pounds was prohibitive, and requested a 33¢ rate; that there was then a 33¢ rate on *refined petroleum and its products* from Port Arthur and West Port Arthur to Tulsa, and that they should have a rate not to

exceed that rate to Kiefer, and that "This naphtha is being moved from Port Arthur to Kiefer to be further refined at that point in connection with products now at Kiefer and *the outbound shipments will consist of gasoline*, and for each car of naphtha moved into Kiefer there is approximately *two cars of gasoline* outbound"; and he asked that the matter be quickly disposed of, adding, "This is absolutely new business." (Ex. 92, Vol. II, p. 1367.) This letter related solely to northbound shipments, and the writer did not hesitate to state just what the product was, and what would be the resultant product after treatment at Kiefer. Whether anything came of the application at that time is not disclosed; but on January 19, 1915, Mr. Christian, representing the Sunset Central Lines, wrote Mr. Ellis with reference to an application made in a conversation on the previous day for 15¢ rate on naphtha from Port Arthur to Kiefer, saying:

> In view of this commodity *having passed beyond the crude state* it necessitated giving consideration to a reduction in the refined product. The current maximum rate between Texas points on refined oil is 25¢, which figure we indicated should at least be the minimum from Port Arthur to Kiefer. Definite advice has now been received indicating application of Texas lines to the Railroad Commission of Texas contemplates minimum rate on refined oil of 30¢ per 100 pounds; therefore it is wholly inconsistent to establish from Port Arthur to Kiefer a lower figure, as by so doing

> it would jeopardize our application to the Texas Commission, thus limiting our earnings on the entire traffic moving between Texas points. (Ex. 93, Vol. II, p. 1368.)

And he suggested that as the existing rate was 33¢, and the conditions precluded the publishing of less than 30¢, it had occurred to him that he, Mr. Ellis, would not insist upon a disturbance of the rates for such a small difference. (Ex. 93, Vol. II, p. 1368.) The statement that the naphtha moving north "had passed beyond the crude state" is important, because it shows that the agents of the carriers could not have regarded the product in question as "unrefined" naphtha. On February 9, 1915, Mr. Ellis wrote Mr. Christian and also Mr. Reilly of the Frisco Lines:

> I have gone into this matter from all angles and am going to ask that you arrange for the publication of 30¢ from Port Arthur to Kiefer and 30¢ Kiefer to Port Arthur, and 25¢ from North Fort Worth to Kiefer and from Kiefer to North Fort Worth, applying on naphtha *and gasoline.* (Ex. 88, Vol. II, p. 1365.)

The designation "gasoline" undoubtedly refers to the product in question, as the record shows that it is the only product moving south from Kiefer to Port Arthur to which such a name could apply. On March 18, 1916, Reilly wrote Ellis:

> Your application has been given careful consideration, and this is to advise that in view of the present conditions, that of our traffic not yielding sufficient revenue to pay cost of operation and the further fact that we are

> now endeavoring to increase rather than reduce rates, it will be impracticable to establish the rates at this time which you propose. (Ex. 89, Vol. II, pp. 1365–66.)

On May 29, 1916, Powers wrote Ellis:

> Some one has suggested cancellation of item 2546–B, Supplement 40, SWL Tariff 26–T, offering as an excuse that continuation of this figure may jeopardize rates of 27 and 39 cents, respectively, to Texas common point territory. We shall be governed by your requirements in the premises as to the cancellation of item 2546–B and shall thank you to fully advise by return mail. (Ex. 86, Vol. II, p. 1364.)

It was admitted that that item referred to a rate on gasoline southbound from Kiefer and elsewhere to Port Arthur, Texas. (Vol. 1, p. 366.)

On June 5, Ellis replied:

> We do not want this rate canceled, as it is in daily use. We are now moving about 18 cars per week on this rate. (Ex. 87, Vol. II, p. 1364.)

On May 16, 1916, Ellis wrote Reilly confirming a wire requesting a 17¢ rate applying north and south between Port Arthur, West Port Arthur, and Kiefer, and described the products to be moved as follows:

> All of our products from Port Arthur and North Fort Worth is an unfinished product *and is passed through the refinery at Kiefer;* and the product secured from this *partial refining* at Kiefer is an unfinished product

and is transported to our Port Arthur refinery, and at that point *further refined*, and we are entitled to the unrefined rate as outlined above. (Ex. 97, Vol. II, pp. 1376–7.)

And on the same day Ellis wired Reilly:

Will you please arrange through Southwestern Committee for publication seventeen cent rate *crude unfinished naphtha* Port Arthur West Port Arthur to Kiefer and Kiefer to Port Arthur West Port Arthur and twenty cents from North Fort Worth to Kiefer and Kiefer to North Fort Worth on same relative basis now published in item thirty twenty two half supplement forty one Leland's twenty-six tee. (Ex. 98, Vol. II, p. 1377.)

The description given in this letter and telegram would certainly not put an agent on notice that it was expected to ship under the rate applied for a product containing no impurities, and which was sold and shipped as gasoline when mixed with a similar product to reduce its specific gravity.

But Mr. Powers testified that he conversed with Mr. Ellis, and that Ellis explained "that it was a low-grade article to be shipped and treated and reshipped" (Vol. I, p. 565); and the witness also stated that he had then had no experience in refining or in the products made by refineries (Vol. I, p. 566). Mr. Reilly (improperly addressed as Mr. Powers) testified that he thinks the wire to him from Ellis dated May 16 (Ex. 98, Vol. II, p. 1377) related to the publication of rates from Oklahoma to

Baton Rouge, and the following colloquy passed between the court and the witness:

> The COURT. Now, do you know? Did you know or go on the representations of the statements made there, or did you know of your own personal knowledge?
>
> A. *We followed the statements of the tariff preceding us from the other Oklahoma producing points.* Reproduced what was ahead of our line.
>
> The COURT. You took the statement what they wanted to put on was the same product these items covered?
>
> A. We did not necessarily take this statement. We were requested to put in a rate on crude naphtha or unrefined naphtha or unfinished naphtha, I do not recall which. We put it in on the regular basis.
>
> The COURT. Without any investigation of what it was?
>
> A. Well, your honor, that is impossible. We can not go out into the field. We don't know what is being shipped. We are hundreds of miles removed from the shipping point. (Vol. 1, p. 571.)

And this witness further testified:

> *In establishing the rate from Kiefer, we had in mind the tariff rate that had been published from Oklahoma and Kansas to Baton Rouge.*
>
> The COURT. And the decision of the Interstate Commerce Commission?
>
> A. *That was carried by the lines originally in publishing the rate to Baton Rouge.* If I may

be permitted to explain the rate-making basis——

The COURT. Now, I will just permit you to state that you had those before you when you did that.

Q. *Well, in the establishment of the Baton Rouge rate you had the Commission decision as a basis; is that correct?*

A. *Yes, sir.*

Q. That was the case, also, as to the Coffeyville rate, established some years prior?

A. I don't recall, the Frisco not being a line between Muskogee and Coffeyville, whether we established that rate.

Q. But in the establishment of the Baton Rouge rate, *you had the order as the basis for the establishment of the Baton Rouge rate?*

A. *The guiding point of the railroads in publishing the rate on naphtha.*

The COURT: *After rates were made, then it was up to the shippers to ship in accordance with them?*

A. *Yes.* (Vol., I pp. 574–5.)

It appears, therefore, that the rate in question was based on the rate then existing from Oklahoma points to Baton Rouge, and that rate was based on the rate from Muskogee to Coffeyville, which was fixed pursuant to the opinion of the Interstate Commerce Commission in *National Refining Company* v. *Missouri, Kansas & Texas R. R. Co.* (23 I. C. C. 527). And the Court of Appeals in its opinion declares that—

In the light of the ruling of the Interstate Commerce Commission in the National Refin-

> ing Company case, the rate on unrefined naphtha theretofore given by one of the carriers to Baton Rouge on a commodity *shown to be substantially the same as the condensate of the Gypsy Company's plants*, and the testimony in this case, we think the insistence (that the conduct of the defendant was fraudulent) groundless and must have been highly prejudicial. (Vol. II, p. 1690.)

That the finding of the court that the product here shipped *was substantially the same* as the product there considered by the Commission is wholly unjustified and erroneous is perfectly apparent from the description of the product given by the Commission in its opinion. A certain product was shipped from Muskogee to Coffeyville, and the railroad charged the rate applicable to *refined* oil, and the petitioner claimed it should have been transported at the rates applicable to *crude* oil. The Commission first mentioned the product as "a certain distillate of petroleum oil consisting of the lighter ends of the crude oil" (Ex. 99, Vol. II, p. 1378); and in describing it the Commission said:

> The product that was shipped seems to have no distinct commercial designation or trade name; by complainant it is referred to as "crude product"; one of the shippers described it in the bills of lading as "crude benzine"; the carriers classed it as refined oil. The evidence shows that the crude oil had undergone a skimming process and that this commodity was one of the two resulting products. The

Muskogee crude, as it comes from the well, has too low a fire test to be salable as fuel oil; by the skimming process the lighter ends of the oil are extracted, and the heavier residue becomes marketable as fuel oil.

This skimming process is accomplished by distillation carried just far enough to separate the lighter from the heavier oil, the former amounting to about one-fourth part of the oil. The extracted product, though not separated in accordance with any specifications, may, therefore, properly be roughly *described as a light-end distillate*, and that designation will be used in this report. It was this product that was shipped, and complainant's testimony was to the effect that *it had no commercial value except for refining purposes; that at complainant's refinery it was kept separate from the crude oils and refined into gasoline, naphtha, turpentine substitute, and a residuum sold as fuel oil.*

For refining purposes this light-end distillate commanded a higher price than the crude oil from which it was extracted. Complainant's president testified that the price of the Muskogee crude oil at the time of purchase was 2 cents per gallon; he was not certain, but thought he paid 3 cents for the light-end distillate. The information of defendants was to the effect that the price was 3¼ cents. Complainant's president testified that, at the time of this purchase, he was in special need of material for lighter-end products, and for this reason was willing to pay a price higher than is customary for this distillate. Under

ordinary circumstances it would be more profitable to use a straight crude oil. (Vol. II, pp. 1380–1.)

It was held that neither rate was applicable, and that a reasonable rate would not have exceeded by more than two cents the rates applicable to crude oil; and that relationship was established for future shipments. *The product there in question was practically worthless until it was refined and converted into other products. In fact it was crude naphtha, or the "naphtha fraction" heretofore described, which by distillation is separated into gasoline, benzine, and painter's naphtha.* If it was not the exact equivalent of the "naphtha fraction" described, it was not so valuable, because a less per cent was separated from the crude oil by the skimming or light distillation process used.

Therefore the railroads had no intention in publishing a rate on "unrefined naphtha" to carry under that rate a blend of casinghead gasoline and painter's naphtha, a product resulting from the distillation of "crude" or "unrefined" naphtha.

Testimony of experts

The defendant introduced a number of experts who testified very fully upon the following subjects:

What is Gasoline

Mr. Tabor explained in detail how crude oil is refined, and said that in the early days of the industry about one-half of one per cent of the crude oil was converted into gasoline, which was used by country people for lighting their houses; and that for a long

time that was the only substance called gasoline. This continued until automobiles came in use, and thereafter it was used in different mixtures. He then proceeds as follows:

> And that continued until by and by the automobiles came along so fast it run the gasoline—there wasn't gasoline enough to supply them and then they had to go to the naphtha to get something heavier, *but they called that gasoline*, because the people who used gasoline knew nothing about the designations, proper designations, of petroleum, and their carburetors at that time had been made to use this very light material; so the people that had the material didn't know it was naphtha; *they called it gasoline*. Then the manufacturers had to make their carburetors so they would burn the heavier material, until finally, in 1885, according to the census report, where one part in thirty was naphtha, the whole naphtha product was prepared, that is, thirty parts of naphtha, *and they called it gasoline*, and more than that, they put some kerosene in it, and that meant the automobile people had to change their carburetor to burn heavier and heavier material, *but they still called it gasoline*. That is the proper name for it isn't gasoline, *from the technical standpoint*. (Vol. 1, pp. 672–673.)

And in defining gasoline, he testified:

> Gasoline *in the strict technical sense of the word* is the product *which is substantially 76 to 80 gravity* (exactly the gravity of the product in question) as described and refined

distillate from petroleum which is suitable for use in carbureting air for making a gas suitable for burning in private dwellings.

Q. That is what the article of commerce known as gasoline is?

A. That is *one* of the articles of commerce known as gasoline for that particular purpose; *that is the original name. Now, there are other articles of commerce, and that is what has been developed by the automobile business.* For that purpose we will say that gasoline is a product, a combination of products of naphtha produced from crude oil, natural gas, casinghead gas, and other source which are made suitable for use in the general run of automobiles which use suction carburetors. It has to be suitable for such use, that is not material that will run one make of car but any make of car that comes along equipped with the ordinary suction carburetor to-day. (Vol. 1, p. 678.)

And in response to the question whether the material produced at Kiefer and Drumright was gasoline, he says:

> It doesn't fulfill either of the specifications for gasoline which I have given. I do not consider it gasoline. I consider it unrefined naphtha. (Vol. 1, p. 678.)

The expert Burrell, when asked to define gasoline, says:

> I prefer to define gasoline as a liquid inflammable substance or mixture of hydrocarbons suitable for use in an automobile engine of to-day. Now, I should say that

> certainly over ninety-five per cent of the gasoline that is used to-day is used in automobile engines. A small amount is used in making gasoline gas for lighting isolated residences, and similar places, and a small amount is used in stoves. Perhaps a better definition would be, an inflammable liquid, a mixture of hydro-carbons suitable for use in any kind of vaporizers. (Vol. 1, p. 691.)

So, while Tabor thinks a product should be called gasoline if it will run *all makes of automobiles*, Burrell thinks it should not be so called unless it is also suitable for use in vaporizers used for *all other purposes*. If this be the correct definition there is no such thing as gasoline, because it is apparent from Tabor's evidence that there is no product that can be successfully used in all kinds of vaporizers. According to this theory oil used to lubricate watches is not oil because it can not be successfully used to lubricate farm tractors.

Burrell further says that there is a great deal of confusion in the nomenclature of the petroleum industry, more in the popular mind "than in the scientific literature, although in the literature some confusion exists." (Vol. 1, p. 692.) And after testifying that the product shipped from Kiefer, Jenks, and Drumright to Port Arthur is not gasoline, he says:

> *It is very popularly called gasoline—I have so called it myself.* (Vol. 1, p. 694.)

And he admits that in a book written by him he used the word "gasoline" almost entirely, but on practically the last page the statement is made that

the word "gasoline" as used therein is very loosely applied, and that the material under consideration does not come under that category until properly prepared for market. (Vol. 1, p. 694.)

The expert Garner testified that in the strict technical sense gasoline "*would be that low boiling portion of naphtha having a gravity from 76 possibly to 82 and usable for the purpose of illumination.*" This is an exact description of casinghead gasoline. He finally says, however, that gasoline is a term applicable to products of petroleum to be used for vaporization purposes; and as a commercial term relating to an article of commerce it is a finished product as distinguished from an unfinished one; and he does not consider it properly can be called gasoline unless it can be used for vaporization purposes, such as running a car or in a gasoline stove; and that the product in question is not in any proper sense gasoline. (Vol. 1, pp. 710–11.) He sticks to this statement after it was demonstrated that it would successfully operate a Pierce-Arrow car (Vol. 1, p. 846), because he says:

> A Pierce Arrow car is a very exclusive car; it is not a car that represents any very considerable portion of the great percentage of the cars; that is the first one, it is not a car in common usage. It is used by people who are very wealthy. In the second place, it is a car that is nearly mechanically as correct as a car can be built. (Vol. 1, p. 850.)

The witness does not, however, undertake to point out exactly what kind of a car must be perfectly

operated and how wealthy its users must be before the fuel with which it is operated can be properly designated as gasoline. Manifestly, according to Doctor Bacon, the fact that a fuel will operate a Ford is no evidence that it is gasoline, because he says "a Ford will almost run on rainwater." (Vol. 1, p. 765.) But Doctor Garner does not agree with Doctor Bacon with reference to the superior virtues of a Ford. (Vol. 1, p. 850.)

Doctor Schock says that "gasoline is a material or substance that is not definable in just a few words"; and again, "The material used to-day under the word gasoline is not identical with the material that was called gasoline years ago." He further says:

> There is a gasoline that existed at that time. It was used in gasoline stoves and that was and did not differ exceedingly from the present gasoline, but in another way it does. The quality and the volatility has been steadily lowered in order to meet the greater demand that at one time the time that your honor refers to gasoline it was a product that was not exactly the same; I won't say that twenty years ago gasoline was a different material, but it was a gasoline that had a lower boiling point, was more volatile as a whole than the present gasoline. (Vol. 1, pp. 718–19.)

The expert Miller says:

> Gasoline I define as being generally that fraction of crude petroleum or similar products lying within the range of boiling point

> and other necessary physical tests which will *satisfactorily and economically* operate an internal combustion motor. (Vol. 1, p. 738.)

This expert introduces another element which he appears to regard as essential for a fuel to be defined as gasoline, and that is that it will operate a motor *economically*.

Dr. Bacon says:

> My definition for gasoline would be this, gasoline is a mixture of combustible liquids, a finished product that will *satisfactorily* run a motor car. (Vol. 1, p. 750.)

He does not add "economically"; but presumably the operation would not be satisfactory unless it was economical. And after explaining how the use of automobiles has dominated the petroleum industry, he says:

> Consequently, I am inclined to believe if anything would come along to-morrow that would properly run an automobile engine and it was derived in large part from petroleum, *that that material would properly be called gasoline*. (Vol. 1, p. 751.)

And—

> I haven't any doubt that in the next three or four years, possibly sooner, new material will come in, and if those materials go in with petroleum distillates, *I believe that that product is correctly called gasoline*. (Vol. 1, p. 751.)

And he further says:

> I thought a great deal since this case came up, what a proper definition of gasoline was,

and it is very difficult to make one. (Vol. 1, pp. 751–2.)

According to this definition, kerosene is gasoline, because practically all tractors and some motor cars are operated with kerosene.

Whether the product in question should be defined as "unrefined naphtha"

While stating that "unrefined naphtha" is an appropriate name, Doctor Burrell adds:

> If I had been asked to select a name for this I don't say I would have used unrefined naphtha, perhaps unfinished naphtha, but I will say unrefined naphtha is a proper name and gasoline is a wrong name. (Vol. 1, p. 694.)

But he really likes the word "condensate" in speaking of natural gas gasoline. (Vol. 1, p. 695.) And he finally says:

> I will admit that this natural gas gasoline is a very fine material; it has helped out the automobile industry; it is very valuable, but casinghead gasoline helps the naphtha just as much as the naphtha helps the other. They are invaluable to each other. You can not say that this material is not high grade (I don't mean it is low grade). It is a very valuable commodity.
>
> Q. Now, in what respect is it unrefined?
>
> A. It is not ready for the market. (Vol. 1, p. 708.)

And Dr. Miller says:

> I consider it a proper designation, the name of unrefined naphtha; *I might personally want*

to call it something else, to be a little more descriptive.

Q. What would you call it?

A. *As unfinished naphtha or unfinished gasoline blend or unfinished casinghead blend or unrefined casinghead blend.* (Vol. 1, p. 741.)

Doctor Burrell admits that he never used in any of his works the term "unrefined naphtha" (Vol. 1, p. 706), and he also admits that in a paper prepared by him entitled "Technology of Natural Gas as Applied to Making Gasoline and Absorption Processes" he says, "as a matter of fact, blended casinghead gasoline finds thousands of satisfied users." (Vol. 1, p. 706.)

Dykema, an expert introduced by the Government in rebuttal, who had formerly been connected with the Bureau of Mines, testified that he had never seen casinghead gasoline called by the name of "unrefined naphtha" in any of the technical works that he had read, and that while he was connected with the Bureau of Mines he had visited every casinghead field in the country, and that he had never heard the product in question called "unrefined naphtha" (Vol. 1, p. 856); and that the product produced by compression of natural gas should be called gasoline regardless of gravity; and that he had never anywhere heard it called "unrefined naphtha" prior to the beginning of this suit (Vol. 1, p. 840).

De Barr, another expert introduced by the Government in rebuttal, testified that casinghead gasoline is not properly designated "unrefined naphtha"

(Vol. 1, p. 879); that it is perfectly refined when it comes from the earth; that the fact that it is blended in order to lower its gravity does not justify calling it "unrefined naphtha," and that he has read many scientific works on the subject and he knows of none that so defines casinghead gasoline (Vol. 1, p. 881).

What constitutes refining

The defendant's experts, Taber and Burrell (Vol. 1, pp. 689–90), both testify that the blending of casinghead gasoline with naphtha to produce a mixture that will meet specifications is a process of refining. Taber says:

> The ordinary meaning of refining is to purify, make fine, remove extraneous matter; remove things that don't belong in the matter. (Vol. 1, p. 680.)

He illustrates by supposing that one is allowed in shipping grain to permit one pint of chaff to be shipped with every bushel. If one had a bushel of grain that contained a quart of chaff he could do either of two things, take out a pint of chaff or put in another bushel of wheat. (Vol. 1, pp. 680–1.) However, this illustration does not apply to the product here in question, because there is nothing to be taken from either the casinghead gasoline or the naphtha with which it is mixed. Both are already in a refined condition; and the sole purpose of mixing or blending is to get a substance that will meet specifications as to chemical and physical quality. An exact illustration would be to suppose that a miller orders

wheat that will produce flour having specified qualities. The dealer has some wheat too soft and other wheat too hard to produce the flour desired. But he complies exactly with the order by mixing the two kinds of wheat in proper proportions. By so doing does the dealer "refine" the wheat? And isn't each variety "wheat", and must it not be shipped as "wheat," though that particular order can not be filled with either of the varieties?

The Government's expert Dykema says that blending of the two products is not a refining of casinghead gasoline, but merely mixing. (Vol. 1, p. 856.) And Doctor De Barr says that the blending of casinghead gasoline with refined naphtha does not tend to refine the gasoline. (Vol. 1, pp. 880–1.)

Dykema says that casinghead gasoline is refined in the ground, and he explains the process (Vol. 1, pp. 833–34), which he describes as practically the same process that is carried on in a still (Vol. 1, pp. 837–8.). The defendant's expert Burrell says that casinghead gasoline "is essentially the result of a distillation operation in the ground."

> The COURT. Then there is a process of refining in the ground?
>
> A. That is one of the processes of refining; yes, sir. (Vol. 1, p. 693.)

Experiment with product in operating cars

The expert, Burrell, in his examination in chief, describes his experience in endeavoring to operate a Packard and also a Dodge car with, first, casinghead

gasoline, and then with the blended product; and in experimenting with the Packard he says they put some curb gasoline in the carburetor, but it ran only about a hundred yards and stopped, and they had the same experience with the Dodge car (Vol. 1, p. 698). But he unconsciously gave an explanation of just why these machines did not operate. On cross-examination he makes the following explanation of a passage which appeared in an address previously delivered by him:

> Q. In that work did you say, "Natural-gas gasoline is not only valuable because of the product itself, but because it is of very high grade—so high, in fact, that it is not economical to use it alone, but so it is mixed with low-grade refinery naphtha and the so-called cracked gasoline, a great deal of which is being made at the present time"?
>
> A. I did, and I will tell you what I meant by the term "high grade." *Automobile makers have changed their carburetors, as fuel became scarcer and scarcer, until to-day that carburetor is made to suit a much more lower-grade fuel than the high-grade fuel of a few years ago; so to-day the low-grade fuel is a high-grade fuel, because that high-grade fuel of a few years ago will not operate an automobile satisfactory.* (Vol. 1, p. 707.)

On cross-examination he admits that he did not adjust the carburetor. (Vol. 1, p. 802.) *Therefore his whole trouble was due to the fact that the grade of fuel was too high for the carburetor as adjusted.*

In rebuttal the witness Downing testified that for six years he made it a practice to use casinghead gasoline to operate a car. (Vol. 1, p. 813.)

Dykema describes a test which was made during the trial. *The fuel first used was strictly casinghead gasoline so weathered as to make it as near as possible like the gasoline that had been shipped from Jenks.* The experiment seems to have been made by parties representing both sides. Both a Packard and a Pierce Arrow were used; and they were put in condition satisfactory to representatives of both sides, and the witness Dykema rode in the Pierce Arrow. He said it started without any difficulty, but stalled at a point about seven miles from Jenks toward Kiefer; and after relieving the pressure and cooling the engine somewhat they started, and went to a point within a hundred yards of the plant, and after again relieving the pressure they drove in. No adjustment whatever had been made of the carburetor; and it was his opinion that if it had been adjusted the car would have run steadily. (Vol. 1, p. 829.)

At Kiefer employees of the plant made a blend of thirty per cent naphtha and seventy per cent gasoline, which was weathered down with steam in the same manner it was weathered at Jenks, until it reached a vapor pressure which was similar to that mixed for shipping. The cars were then drained to the satisfaction of representatives of both parties. He says the car "*Didn't make a single stop,*" *and they had no trouble whatever with the engine. They*

made the 19 or 20 mile trip between 12.20 and 1.03, and sometimes ran 35 miles per hour, as fast as they regarded it safe. (Vol. 1, pp. 830–1.) There is no testimony with reference to the operation of the Packard, in which apparently the defendant's representatives rode. Presumably, therefore, there was no trouble in the operation of that car.

The Government's expert, De Barr, testified that three years previously he drove a Ford car several hundred miles on compression gasoline, and also drove a Dodge roadster with compression casinghead gasoline a week or two. He used casinghead gasoline because the company was letting him have it for nothing. (Vol. 1, pp. 882–3.) He thinks, however, that because of its volatility he would not let his wife use it unless she were first familiarized with it.

Definitions of gasoline

The Standard Dictionary defines gasoline as:

> A colorless, volatile, inflammable product of the distillation of crude petroleum, having a specific gravity of .629 to .667 (95° to 80° B.). It is used as fuel in vapor-stoves and for carbonizing air and water-gases.

> We find *gasoline* in use in our State in the hands of persons who do not know that the vapor arising from it, when mixed with the atmosphere in the proper proportion, is one of the most dangerous explosives.—Rep. Sec. of Mich. St. Bd. of Health, '88, p. 200 (89).

Webster defines gasoline as:

> A volatile, inflammable liquid used as a solvent, for oils, fats, etc., as a carburetant, and to produce heat and motive power.

The Century Dictionary definition is:

> A volatile liquid product commonly obtained from the distillation of petroleum. Its specific gravity is .629 to .6673 (95° to 80° B.). Used for saturating air or gas in gas-machines or carburetors, and in the engines of motor vehicles.

The Encyclopedia Americana states that the specific gravity of gasoline ranges from 58 to 90.

Casinghead gasoline is a distillate of crude petroleum, the distillation taking place by natural processes in the earth. (Vol. 1, pp. 837, 880.) In the earth, the oil is under a pressure, commonly called rock pressure, which raises the boiling point of the various components of the oil and causes the formation of a gas, called casinghead gas. The condensation of this gas produces gasoline which is in a pure, refined condition and which needs no refining. (Vol. 1, pp. 837–839.) It is a high gravity gasoline, its gravity, as it comes from the compressors (prior to blending or weathering) being as high as 88° to 90° B. (Vol. 1, p. 242.) Blending and weathering reduces the gravity to as low as 60.9 B. It thus appears that the commodity shipped by the defendant is strictly in accordance with the dictionary definition of gasoline, which must be taken as the common acceptation.

CONCLUSIONS OF FACT

From the foregoing evidence the following inferences of fact must be drawn:

1. That before the advent of the automobile the only product known as "gasoline" contained the same specific gravity, and possessed substantially, if not exactly, the same characteristics as the product which defendants shipped as "unrefined naphtha."

2. That from the enormous demand for fuel that will vaporize and explode caused by the development of the gasoline motor, there has been produced a number of varieties or grades of such fuel, all possessing the same general characteristics, and so far as this record shows the same chemical elements, but differing in volatility, some kinds being better adapted to certain makes of vaporizers than to others; that the quality of the fuel depends primarily upon its specific gravity, and the quality desired by a purchaser is obtained by blending those having different gravities; that the product in question has a high specific gravity and is a high-grade fuel; *and that all varieties of this class of fuel have always been known in common parlance as "gasoline," and so designated in all treatises upon the subject, except now and then a writer has suggested that the name did not apply in its technical sense.*

3. That defendant always called this product "gasoline" in its correspondence, and shipped it as gasoline up to the time the "unrefined naphtha" rate went into effect, and continued to so bill and ship it elsewhere than to West Port Arthur.

4. That no other producer supposed that the "unrefined naphtha" rate had any application to this product, and all of them continued thereafter to bill and ship it as "gasoline," the defendant being the only producer that ever at any time billed and shipped it under any other designation than "gasoline."

5. That in the common parlance of the trade, as well as by shippers, except by defendant after December 2, 1916, it was always known as "gasoline."

6. That it has never been called by any one at any time, in either common parlance or in scientific works, "unrefined naphtha," except in connection with shipments made by defendant to West Port Arthur after December 2, 1916.

7. That defendant's own experts, while saying it will answer to the name "unrefined naphtha," yet clearly regard some other designation, such as "unfinished naphtha," or "a distillate," as preferable.

8. That in fact it is not "unrefined naphtha" in any sense of the term. It is not "naphtha"; but is either casinghead gasoline, which is not known as naphtha, or a blend of such gasoline and painter's naphtha. And it is certainly not "unrefined." The painter's naphtha is the product of double distillation, one separating the "naphtha fraction" from the petroleum residuum, and the other separating the crude naphtha, or "naphtha fraction," into three elements commonly known as gasoline, benzine, and painter's naphtha, each of which is a *perfectly* refined product. And the casinghead gasoline has been

refined first in the earth, and then by eliminating the moisture and the more volatile elements by weathering and compression.

9. That the product is really gasoline. It contains the same constituent parts and the specific gravity and color of the original highly volatile gasoline, and vaporizes and explodes as gasoline, and will operate some makes of cars reasonably well without readjustment of carburetors, and could be successfully used in operating any car if equipped with a suitable carburetor.

10. That defendant instigated the publication of the rate on "unrefined naphtha," intending at the time to take advantage of it and ship under that designation this product which had always theretofore been known and shipped as "gasoline"; and

11. That the railroad companies understood when the rate was put in that it would apply to crude naphtha, or a product similar thereto, to wit: the product the Interstate Commerce Commission had considered in *National Refining Company* v. *Missouri, Kansas and Texas Railroad Company.* (Rec. Vol. 2, p. 1378.)

Legal principles controlling application of rates

This product had to be shipped from Kiefer, Drumright, and Jenks to West Port Arthur either as "gasoline" at a 33-cent rate or as "unrefined naphtha" at the 19½-cent rate. It could not legally be shipped under both rates. If the 19½-cent rate is applicable, the railroads discriminated against all

the other producers, and are liable to them to the extent of the discrimination, and are subject to prosecution for exacting an excessive rate. Under the statute there can not be two rates on the same product between the same points over the same lines at the same time. *National Elevator Company* v. *Chicago, M. & St. P. Ry. Co.*, 246 Fed. 588, 592.

That rate is applicable in which the commodity is the more accurately described; and the question is, which designation is the more appropriate for the commodity defendant was shipping, "gasoline" or "unrefined naphtha?" That is a question of fact for the determination of the court, if there is no conflict in the evidence, or if the name of the article is so well known that no doubt can exist that one designation and not the other must apply. If, on the other hand, any doubt does exist as to which is the true name, the question must be determined by the jury. The important question here is, by what rule is it to be determined whether this commodity is more accurately described as "gasoline" or "unrefined naphtha?" Is the opinion of experts as to what *should* be called "gasoline" and what an absolutely scientific and technical definition should be to be treated as conclusive, or is at least consideration to be given to what those who produce, handle, ship and consume gasoline understand that word to mean? If any weight is to be given to such understanding, there was a question of fact for the jury. And furthermore, if but one inference can be drawn from the evidence, and that inference is that this commodity

was known as "gasoline," and not as "unrefined naphtha," in the common language of the trade and by those engaged in shipping it, we insist the trial court should have told the jury that the commodity was "gasoline;" and that no harmful error could be committed by the court in the admission of evidence, or in his charge to the jury, or in refusing to charge requests presented by the defendant, or by counsel in presenting the Government's case to the jury.

The following authorities correctly illustrate the rule by which the question of fact should have been determined.

In *Ohio Foundry Company* v. *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company*, 19 I. C. C. 65, 66, the question was, what rate was applicable to shipments which consisted of mixed carloads of articles claimed by the railroad company to be "gas grates," but which the Foundry Company claimed to be "gas fireplaces and grates, and iron fireplaces and grates designed for burning coal." There was a rate of $1.45 on "iron fireplaces and grates for same, n. o. s., made of wrought or cast iron, also furnace grates, *gas grates* (boxed or crated); portable fireplaces and portable steam radiating mantels; iron linings; grate dampers, andirons (iron), o. r. b., and chafing," and a rate of $1.35 on "iron fireplaces and grates for same n. o. s., made of wrought or cast iron; also furnace grates," and the same rate on "portable fireplaces and portable steam radiating mantels, o. r. b." Evidence was taken showing that fireplaces and grates for the use of gas were made in the

same factory that made fireplaces and grates for the use of coal and wood; that they were of the same make and style, were shipped in crates of about the same dimensions, and that they were shipped in the same cars and from and to the same points. In passing upon the question, the Commission said:

> The evidence shows that "gas grates" *is a trade name which has reference to and includes fireplaces made of iron for the burning of gas. We do not think that the declaration by the shipper in the invoices that the shipments were "gas grates" is conclusive of the question of what the shipments actually were.* The tariff application is to be construed with reference to what articles actually comprised the shipments. There is no question that the shipments were mixed carloads of gas fireplaces and grates and coal fireplaces and grates. It is admitted by defendants that, if the shipments were fireplaces and grates for the use of coal or wood, the $1.35 rate should be applied, but, it is asserted, that the fact that they contained gas grates removes them from the class taking the lower rate.

And it was held that the lower rate applied.

In *Pacific Coast Biscuit Company* v. *Oregon Railroad & Navigation Company*, 20 I. C. C. 178, 180, the Commission had under consideration what rate should be applied to a shipment of paper waxed with paraffin and used as an inside lining for cartons containing crackers and an outside wrapper for protection against moisture on packages exposed to a moist or damp climate. A rate of $1.20 was applicable to

"Paper . . . wax or gummed paper" and also a rate of $0.75 on "Paper. Wrapping paper, n. o. s." Evidence was introduced to show to what use this paper was put, and what was meant by "wrapping paper," and the names by which the paper in question was known. In deciding that the higher rate applied, the Commission said:

> As a matter of tariff interpretation, we are constrained to hold that a specific rate having been established on wax paper, defendants were compelled to apply that rate to all grades and qualities of wax paper regardless of the use to which it was put. Although this paper was admittedly used in part as an outside wrapper, it is clear that it is a wax paper *as that term is understood in the trade*, and it follows that the proper rate, under the tariffs in force, was applied by the carriers.

In *Western Mantle Company* v. *Spokane, Portland & Seattle Railway Company*, 20 I. C. C. 643, 645, the shipments in question consisted of material for use in the manufacture of gas mantles. In the freight bill the commodity was designated by the delivering carriers as "knit goods," "knit dry goods," "gas-mantle fabrics," "mantle gauze," and "dry goods," and in the invoices rendered by the manufacturer it was uniformly described as "mantle fabrics." The evidence showed that the shipments consisted of cotton knit fabrics or knitting-factory products used by the complainant as foundation material in the manufacture of gas mantles, and was referred to in the

trade generally as "knitting," but sometimes as "netting." There was a rate of $2.20 on "netting, cotton, n. o. s., in boxes or bales," and a rate of $3 on "dry goods, n. o. s., in bales or in cases." The carrier had collected the higher rate. After discussing the evidence, the Commission said:

> In our opinion the commodity shipped was not cotton netting, *as that article is commonly known to the trade;* and, as a matter of tariff interpretation, we are of opinion that the term "netting, cotton, n. o. s.," is not properly descriptive of the shipments. In the absence of a provision specifically covering the commodity it was properly classed by the carriers as "dry goods, n. o. s.," and the lawful rate was applied.

In *Chicago, B. & Q. R. Co.* v. *Feintuch*, 191 Fed. 482, 488 (C. C. A., 9th Circuit), the question was whether show cases were furniture within the meaning of railroad tariff. On application to the Commission by the shipper it had been held that show cases fell within that description, and reparation was awarded, and this action was brought to recover the amount due as found by the Commission. The Court of Appeals said:

> The witnesses are in hopeless discord in their opinions—experts on tariff rating, some of them are—touching whether show cases are articles of furniture. It seems to be conceded that show cases fall within the dictionary meaning of the word "furniture," *which would*

be the common acceptation. The Century Dictionary gives this definition:

"Furniture. (1) In general, that with which anything is furnished or supplied to fit it for operation or use; that which fits or equips for use or action; outfit; equipment; as, the furniture of a war horse, or of a microscope; table furniture . . . (3) Collectively and specifically—(*a*) Those movables required for use or ornament in a dwelling, a place of business or of assembly, etc."

Formerly, and even now, show cases of a certain type rested upon counters in business places, not in any way affixed thereto, and were used for the display of articles of merchandise kept for sale. More recently these cases are made to extend to the floor, and are used for the display of articles of merchandise and also for counters over which goods are sold, but, as we understand, are not in any way affixed to the floor or building, and hence can not be termed fixtures in any sense. They are "movables," and may be shifted from place to place, or even removed from the place of business, without the necessity of detaching them. In this sense, show cases are properly classified as furniture, *and that, being the common acceptation of the term, should prevail over any technical meaning the word has acquired by tariff usage in the construction of tariff schedules. The schedules are published for the information of the public in general, who are not supposed to be cognizant of technical usage in rate problems, and it would be a snare to the unwary and uninformed to construe and interpret tariff sched-*

> *ules by any such technical standard.* It follows that the tariff in the present instance was properly interpreted.

Lakewood Engineering Company v. *New York Central R. Co.*, 259 Fed. 61, 62, 63 (C. C. A., 6th Circuit), was an action brought to recover a judgment for the payment of an excessive rate. The higher rate was upon "Tracks, portable railway, set up in sections," and the lower rate upon "New iron and steel rails and iron and steel railroad crossties, for export only." The articles shipped consisted of "two steel rails in parallel position, steel crossties riveted at each end thereof to the rails and fish-plates, with the necessary bolts for attaching the ends of the rails to the ends of those of the adjacent section," but the plates and bolts were not attached to the rails and were shipped separately. The lower court held as a matter of law the higher rate applied; and the judgment was affirmed by the Circuit Court of Appeals; but Judge Denison, speaking for the court, said:

> We assume, for the purposes of this opinion, and without undertaking to decide whether the assumption should in some cases be limited or qualified, that if there were ambiguity as to the two tariffs, or if there were material uncertainty as to the proper trade definition of an article shipped, there would be an issue of fact, and the action of the court below would have been erroneous.

But in considering which rate was applicable, he said:

> For the purposes of definition and classification a steam engine does not cease to be such because the governor is omitted, nor would shoes be anything but shoes if shipped without buttons or laces. These sections might have been provided with the bolts and plates, but one tie might have been left off, whereby the sections would not have been satisfactory for contract delivery until the missing tie had been supplied, but we think they would still be "sections of portable railway track;" and the same thought covers the deficiency which here existed.

So it may here be said that the fact that the commodity in question varies in some particulars from the product that will successfully operate a Packard car does not prevent its being properly called and shipped as "gasoline."

A similar rule has often been applied by this court in determining what rate applies on imports.

Thus, in *United States* v. *Isham*, 17 Wall. 496, 504, the court said:

> The words of the statute are to be taken in the sense in which they will be understood *by that public in which they are to take effect.* Science and skill are not required in their interpretation, except where scientific or technical terms are used.

In *Swan* v. *Arthur*, 103 U. S. 597, 598, it was said:

> While tariff acts are generally to be construed according to the commercial under-

> standing of the terms employed, language will be presumed to have the same meaning in commerce that it has in ordinary sense, unless the contrary is shown.

In *American Net and Twine Co.* v. *Worthington*, 141 U. S. 468, 471, the court said:

> It is a cardinal rule of this court that, in fixing the classification of goods for the payment of duties, *the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification without regard to their scientific designation, the material of which they may be made, or the use to which they may be applied.*

And in *Hedden* v. *Richard*, 149 U. S. 346, the court said that the words used in customs tariff "*are to be taken in the sense in which they will be naturally understood by those to whom they are addressed.*"

Under the regulations of the Interstate Commerce Commission the commodity shipped could not lawfully be transported under the designation "unrefined naphtha"

Section 235 of the Penal Code of the United States (35 Stat. L. 1134) provides that—

> The Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives. * * *

In conformity with this statutory direction, and under the additional authority of section 15 of the act to regulate commerce, the Commission formulated and promulgated, in 1910, a set of "Regulations

for the transportation of explosives and other dangerous articles." Such regulations of an administrative body, issued under the authority of a statute, have the binding force of law. *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Grimaud*, 220 U. S. 506; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194.

Important amendments of these regulations were made in 1914, 1916, and 1918. Rule 1824 of the regulations relates to the transportation of inflammable liquids and paragraph (k) of that rule relates particularly to liquid condensates from natural gas or from casinghead gas of petroleum oil wells—in other words, to casinghead gasoline.

Paragraph (k) of rule 1824, effective except as noted therein May 15, 1916, in force at the beginning of the period covered by the indictment (December 2, 1916), and remaining in force without change until September 1, 1918, will be found on pages 1079–1080 of the record. On September 1, 1918, paragraph (k) of rule 1824 was amended. The amended rule is found at pages 1259–1260 of the record.

Apparently the Court of Appeals did not consider the important bearing of these regulations upon the question at issue, i. e., whether the commodity shipped was gasoline or unrefined naphtha, and therefore it apparently did not appreciate that the testimony of defendant's expert witnesses that the commodity in question was not gasoline was at variance with the views of the Commission as ex-

pressed in the regulations, that the product of the compression of natural gas or the blending of liquefied petroleum gas with refinery gasoline or naphtha is gasoline.

The attention of the court is called particularly to the "List of principal dangerous articles," as published in both sets of regulations, that is, both the regulations of May 16, 1916, and those of September 1, 1918. These lists will be found at pages 1070–1076 and 1248–1255 of the record. These lists show the names of *well-known* articles in general use, other than explosives, that are dangerous, each list being preceded by a statement to that effect (see pages 1068 and 1220 of the record), rule 1807, which reads:

LIST OF PRINCIPAL DANGEROUS ARTICLES

> 1807. (a) The following list shows the names of well-known articles in general use, other than explosives, that are dangerous; * * *

Included in the lists are "gasoline" and "liquefied petroleum gas." Liquefied petroleum gas is the liquid condensate from natural gas or from casinghead gas of petroleum oil wells (casinghead gasoline), whose vapor tension exceeds 10 pounds per square inch. (Rule 1824–k.)

Opposite the word "Gasoline" as published in both lists appears the following note, the significance of which will not escape the court:

> Gasoline made by compressing natural gas or by blending liquefied petroleum gas with

> refinery gasoline or naphtha may be described and shipped as gasoline, provided the vapor pressure does not exceed 10 pounds per square inch.

We submit that by this expression the commission recognized that casinghead gasoline, whether unblended or blended with refinery gasoline or naphtha, is gasoline. The recognition that unblended casinghead gasoline is gasoline is embodied in the first clause, "*Gasoline made by compressing natural gas.*" The recognition that casinghead gasoline when blended with refinery gasoline or naphtha is gasoline is embodied in the words "Gasoline made * * * by blending liquefied petroleum gas with refinery gasoline or naphtha."

Another feature of the lists of dangerous articles whose significance is highly important is that *unrefined naphtha* does not appear in the lists. Is it not a matter of plain, common sense that if the commodity which is the subject matter of this case were unrefined naphtha it would be shown in these lists of names of well-known articles in general use that are dangerous? The commodity in question surely must be regarded as a well-known article when it is taken into consideration that in 1915 over 65,000,000 gallons of it were produced in the United States, and between 80,000,000 and 100,000,000 gallons in Oklahoma and California alone in 1917, and 300,000,000 gallons in 1919. (See page 2, Dykema's Bulletin and Rec. 690.) Not only does *unrefined naphtha* not appear in the lists of dangerous

articles as published in the regulations, but *that term does not appear anywhere in the regulations.*

There is no authority in either set of regulations to describe or ship this commodity as "unrefined naphtha." Paragraph (k) of the regulations of May, 1916, provided in part as follows:

> Liquid condensates from natural gas or from casinghead gas of petroleum oil wells whose vapor tension exceeds 10 pounds per square inch must be described as liquefied petroleum gas. * * *
>
> When the condensate, blended or unblended with other products, has a vapor tension not exceeding 10 pounds per square inch, and is shipped as "Gasoline" in an ordinary tank car, 60-pound test class, defined in Master Car Builders' Association Specifications for Tank Cars, the safety valves of such a car must be set to operate at 25 pounds per square inch, with a tolerance of one pound above or below. * * * (Rec. 1079.)

The amended regulations of September 1, 1918, provided:

> Liquid condensates from natural gas or from casinghead gas of oil wells, made either by the compression or absorption process, alone or blended with other petroleum products must be described as liquefied petroleum gas when the vapor pressure exceeds 10 pounds per square inch.
>
> When the condensate, alone or blended with other petroleum products, has a vapor pressure not exceeding 10 pounds per square inch,

it must be described and shipped as gasoline, casinghead gasoline, or casinghead naphtha.

It seems clear that under the earlier regulations there were but two terms which could properly be used for railway billing purposes in the transportation of casinghead gasoline, either alone or blended with some other petroleum product, (1) "liquefied petroleum gas," when the vapor pressure exceeded 10 pounds per square inch, and, (2) "gasoline," when the vapor pressure was 10 pounds or lower. This is also true under the regulations of September 1, 1918, except that under those regulations the product could be shipped as "casinghead gasoline" or "casinghead naphtha" besides as "gasoline" when the vapor pressure was 10 pounds or lower. There was no authority whatever to ship it as unrefined naphtha; and the shipping of it under that designation alone, or in addition to some authorized designation, was a violation of the regulations and itself a misdemeanor under section 235 of the Penal Code.

It may be suggested that the regulations of the commission are safety regulations and do not have bearing upon the rates. But these regulations do have a bearing on the rates, for the reason that the regulations were published in the Western Classification and thereby made a part of the tariff rules governing the transportation. The regulations effective October 1, 1914, as amended to September 1, 1916, including the amendments effective May 15, 1916, were published in Western Classification No. 54, I. C. C. No. 12, effective September 1, 1916 (Rec. 1062), as rule

44 thereof (Rec. 1065). Western Classification No. 55, I. C. C. No. 13, effective April 1, 1918 (Rec. 1121), superseded the previous issue and brought forward the regulations as rule 44 (Rec. 1123).

The amended regulations of September 1, 1918, were published in Supplement No. 5 to Western Classification No. 55, I. C. C. No. 13, which supplement became effective August 29, 1918. (Rec. 1140–1142.)

The tariffs naming the rates applicable to the shipments in question were governed by Western Classifications Nos. 54 and 55. See, for example, Supplement No. 52 to I. C. C. tariff No. 1048, effective November 16, 1916, naming the 33-cent rate on gasoline in effect at the time the shipments in question began to move, December 2, 1916, which bears the notation "Governed * * * by Western Classification No. 54." All of the tariffs involved carried similar notations. Thus rule 44 of the classifications, embodying the commission's safety regulations, were made part and parcel of the tariffs, deviation from which is unlawful under the act to regulate commerce and the Elkins Act.

Since the safety regulations are part of the lawfully applicable tariffs, which constitute the legal standard, and since the regulations prohibit the transportation of the commodity in question as unrefined naphtha, it follows that the tariffs themselves negatived the application of the unrefined naphtha rates on the shipments in question. Had the shipments been billed under any of the designations authorized by

the regulations, and hence by the tariffs, the gasoline rate or a rate not lower than the gasoline rate would have been applied.

In view of what has heretofore been said, but brief consideration need be given to the remaining assignments.

II

Assignment of errors relating to admission of evidence

1. The court held that:

> Throughout the trial, during introduction of evidence, and in argument the prosecution insisted that the conduct of the defendant was fraudulent. One of the grounds of this insistent (insistence) was the fact that the defendant's traffic agent asked for the rate on unrefined naphtha, a commodity which had theretofore been and was then being shipped as gasoline to Port Arthur; but in the light of the ruling of the Interstate Commerce Commission in the National Refining Company case, the rate on unrefined naphtha theretofore given by one of the carriers to Baton Rouge on a commodity shown to be substantially the same as the condensate of the Gypsy Company's plants, and the testimony in this case, we think the insistence groundless and must have been highly prejudicial. (Vol. II, p. 1690.)

There is nothing in the record indicating that Government counsel made any vicious or persistent charges of fraud against defendant. There was at

times suggestions of deception, but certainly nothing more than was amply justified by the facts proven.

As heretofore shown, the Court of Appeals was entirely mistaken as to the nature of the order made by the Interstate Commerce Commission in the National Refining Company case. The commodity there under consideration was not even of as high a grade as "crude naphtha," by which is meant the "naphtha fraction" before it is distilled and separated into gasoline, benzine, and painter's naphtha. The evidence well warranted the conclusion that the defendant was guilty of deception in securing the adoption of a rate on "unrefined naphtha," and then shipping under that rate casing-head gasoline and a blend of casing-head gasoline and painter's naphtha. But if the proof did not warrant a finding of actual fraud, yet there is no precedent to support the holding that it is reversible error for counsel to make a contention which the court subsequently finds is not maintainable. If that be a correct principle, then counsel dare not take any position in the trial of a lawsuit which he is not absolutely certain will be maintained.

2. The Court of Appeals further held that it was error to admit testimony that this same commodity was shipped to Pittsburgh by the Gypsy Company as "gasoline" while it was being shipped to Port Arthur as "unrefined naphtha," because no rate on unrefined naphtha was in effect between Kiefer, Drumright, and Jenks and Pittsburgh.

Manifestly any evidence was competent which reasonably tended to prove under what name the commodity in question was generally known and handled. And the fact that it was shipped upon any lines of road between any points under the designation "gasoline" tends to prove that it was known as "gasoline." And evidence that defendant itself was so shipping it was specially pertinent to show that it knew and recognized that gasoline was a name in use for the article. There were two important elements of proof: one, to show to what extent the commodity was known as gasoline, and the other, how commonly it was known, if at all, as unrefined naphtha. The evidence which the Court of Appeals held should have been excluded was certainly material to prove the first element, and the very fact that no rate on unrefined naphtha existed between the three points mentioned and Pittsburgh, though this commodity had for years been shipped from them to Pittsburgh, tended to prove that it was not known in the trade as "unrefined naphtha."

Suppose a rate had been put in on beeswax between Kiefer and West Port Arthur, and thereupon defendant began to ship this commodity under that name; must the court take that designation as conclusive and exclude evidence as to the name under which it was shipped from Kiefer to Pittsburgh because no rate on beeswax existed between those points?

3. The court also held that it was error to admit evidence showing that the products at other casing

head compression plants in Oklahoma were called "gasoline" and shipped as such "without a showing that they were substantially similar to those of the Gypsy Company, and in the face of proof that they were not of a uniform blend with the Gypsy Company but contained, *in some instances*, as much as 75 per cent naphtha."

In fact the evidence did show that the products of those plants were substantially the same in character as the product in question shipped by the Gypsy Company. It may be that in some instances the blend shipped by other companies contained a higher percentage of painter's naphtha than the blend shipped by the Gypsy Company, and in other instances the blend was lower. *But the evidence shows beyond question that this entire class of products, to wit, casing head gasoline, and all proportions of blends of casing head gasoline and painter's naphtha, is known by those that produce them and in the trade as "gasoline," and are continually shipped as such.* That fact is certainly very material in determining whether or not the commodity in question was gasoline and should have been shipped under the gasoline rate; and any evidence that tended to show such fact was admissible.

III

Assignment of Errors Relating to Statements made in Argument by Defendant's Counsel

1. The following occurred during argument of one of the Government's counsel:

> COUNSEL. Mr. Tabor, the vice president of the company, quoted a list of works of about

150, perhaps, all told on the subject of naphtha, but when it came to the subject of how many of those deal with unrefined naphtha he was crowded back to the conclusion that there was but one man and that he had been quoted by another, and one of those men was the employee or rather came from the Mellon Institute in Pittsburgh. Now, what is this Mellon Institute? It is an institution that was founded by the Mellon family of Pittsburgh. Mr. W. L. Mellon is president of the Gulf Oil Corporation.

Mr. DIGGS. If the court please we except to that, as no evidence (is) in the record showing Mr. Mellon's connection with this company. W. L. Mellon as president, the evidence being that the sworn evidence of George S. Davis was president.

The COURT. Yes.

Mr. GANN. He was president of the Gulf Oil Corporation.

Mr. DIGGS. No evidence connecting him with this case at all.

The COURT. Yes there is not any evidence here and the jury will not consider it. (Vol. 1, pp. 905–6.)

In fact the statement here made by counsel was wholly immaterial, and there is nothing in the record to indicate that it could have had any unfavorable effect whatever. It was directed toward the testimony of Mr. Tabor, who seems to have cited as an authority an employee of the Mellon Institute in Pittsburgh. Counsel asserted that this institute

was founded by the Mellon family, being at the time under the impression that the evidence showed that Mr. Mellon was president of the Gulf Oil Corporation, but the court at the time told counsel that there was nothing in the record to show such fact, and the matter there ended. In the first place, the testimony of Mr. Tabor, in so far as it was based upon opinions of the nature mentioned, was within itself of practically no value; and the suggestion of a connection of a gentleman upon whose writings the witness based his opinion with the Mellon Institute, and that the Mellon Institute was in some remote way connected with some one who had an interest in the defendant, Gulf Refining Company, was entirely too remote to have had the least effect upon the mind of the jury. Undoubtedly counsel should have confined himself strictly to the record; but if it be adopted as a rule that judgments must be reversed because of such incidental remarks, but few judgments will be sustained by appellate courts.

2. The Court of Appeals also held that the following remarks made in argument by counsel for the Government were prejudicial:

> Gentlemen of the jury, there is this in this case, if the commodity which they shipped and transported under the instructions which will be given to you by the Court in your judgment, after hearing all of the evidence, is gasoline, then by reason of there being another name for it, they violated the laws, they placed the other shippers in a position where they were not able to compete with them; they

> placed in their own pockets hundreds of thousands of dollars of which they were not entitled to and which the people of the United States have got to bear the burdens and it is true that the Gulf Refining Company will have to join, thank goodness, the other people of the United States to pay these things if it had to be paid. (Vol. 1, p. 907.)

No exception was made to these remarks by counsel for the defendant. As a matter of fact what was said by counsel is literally true as would probably have occurred to the mind of any juror, but it was such an insignificant fact that no attention would be given to it whether mentioned or not.

However, the court was careful to exclude from the minds of the jury all references by counsel upon both sides to matters outside the record. When court convened on the morning after these remarks were made, as argument was about to be resumed by counsel for the Government, the court remarked:

> Wait a minute. Now, gentlemen of the jury the defendant makes the following exception; the defendant excepts to the comment of the Government's counsel, Gann and Chambers, suggesting that the United States Government pecuniary affected by the manner of the consideration, the defendant not being on trial on charge of defrauding the United States, and also except to the comment of the Government counsel Chambers upon the wealth of the defendant; such comment to the jury being highly improper and calculated *and* inflame and defendant moves the court to

instruct the jury to especially disregard such remarks. And defendant also excepts to the statement of Mr. Chambers to the jury charging the defendant had violated the safe transportation rules, such charge being contrary to the fact and admission of the Government, and calculated to inflame; and defendant moves the court to especially instruct the jury regarding it. Now, yesterday both sides on these points, to my mind, went outside of the proper domain, as there was no objection, I permitted them to do that. One side charged in the argument that the railroad a part of the time when the railroad under the war, under the Federal control. Then the statement was made about what the result would be affecting members of the jury. Everything else, that has got nothing to do with the case. Then the other side said how it affected their clients, how they could be made to refund in civil damages. So I admonish you to try the case according to the evidence. Hear the arguments of the attorneys, and when they are sound, if they are sound, that is for you to determine about that. If they do not confine themselves to the evidence in the case, that is for you to determine about that. The case is to be tried without fear or favor. Without any regard as to how it affects people, but solely with a view to the weight of evidence as to be determined by the jury and as to the law to be given you. The exception was made on the reconvening of court and after the argument had been made the previous day, but before the argu-

ments were finally concluded. (Vol. 1, pp. 908–9.)

And just before the Trial Judge delivered his charge to the jury he again admonished them as follows:

> Gentlemen of the jury, before I begin the charge I will read to you what I said this morning. Now, on yesterday both sides on these points, to my mind, traveled outside of the domain of proper argument. I permitted them to do this, no objection being made by either side at the time. One side suggested in the argument that the railroads a part of the time were under Federal control, being in the hands of the Director General; in another statement that was made, that the result of the verdict might affect the interests of the taxpayers, including the interests of the jurors, or in substance that. Then on the part of the defendant it was adverted to the fact that the defendant could be made to refund in a civil suit. The jury are admonished that the case is to be tried according to the evidence and the admissions in the case. The jury are to hear the arguments of the attorneys, and when they consider the argument sound as relating to prove facts from the evidence admitted in the case and the admissions in open court before the jury, that is for them to determine. If the attorneys do not confine themselves to the evidence and admitted facts in the case, the jury should disregard such argument. The case is to be tried without fear or favor and without prejudice and without any regard to the pecuniary effect upon any-

> one, but solely with a view of justice. As regards the safety appliances, it is my understanding there is no contention of any violation of the same by the defendant in observing regulations prescribed as precautions to safety. That is for the purpose of reading that in the record and is an admonition to the jury. (Vol. 1, p. 911.)

These instructions by the court certainly obviated any unfavorable influence that argument of counsel otherwise might have had upon the minds of the jury.

For the foregoing reasons the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

JAMES M. BECK,
Solicitor General.

J. A. FOWLER,
Special Assistant to the Attorney General.

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